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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-510

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioners,

v.

THE UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the Interstate Commerce Commission adopt a general rule codifying a policy it is already applying on a case-by-case basis, or is it forced to continue considering the issue in each case on an individual basis?

2. Does the involved rule violate the applicable statute?

3. Is the involved rule rational?

4. Does the involved rule abridge the due process rights of opposing parties?

STATEMENT OF THE CASE

Generally, the respondents represented herein are satisfied with petitioner's statement of the case and find no need to restate it. Two areas contained therein, however, require further comment:

1. On page 4 of its petition, petitioner states that "the Commission had always recognized its statutory obligations to review the circumstances of each application. . . ." To the extent that petitioner implies that each application must be fully litigated on the dual operations issue on a case-by-case basis, we disagree. First, we can find no case support for the notion of a statutory obligation to review each case individually. (Petitioner refers us to none.) Second, we do not believe any statute compels a case-by-case analysis. Finally, since the Commission is admittedly seeking to change its past practice, the simple fact that it acted in a certain manner in the past cannot be construed to prove the legal necessity of acting in that manner.

2. On pages 4 and 5 of the petition, petitioner states that the Commission's notice of proposed rulemaking[1] "anticipated that the Commission's adoption of the proposal would result in approval of future dual operations . . . which otherwise would not have been approved." Such "anticipation" appears nowhere in the notice. Moreover, the statement is incorrect. The involved rule has the effect of codifying current I.C.C. policy.[2] As

[1] Appendix D to Petition, pp. 31a-39a.

[2] This case law is expressed in a line of cases beginning with Delaware Express Co. v. Milford Express, Inc., 119 M.C.C. 499 (1973), and continuing in Delaware Express Co. v. Milford Express, Inc., 126 M.C.C. 462 (1977) and Charter Express, Inc. - Extension-Truck and Trailer Parts, 126 M.C.C. 671 (1977).

such, its only effect on the current handling of cases will be procedural in nature – streamlining processing and avoiding unnecessary litigation. The rule does not involve any further substantive changes.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE PETITION

The thrust of petitioner's argument for certiorari is its contention that the involved rule, and the D.C. Circuit's decision thereon, significantly alters future I.C.C. actions. Since the policy underlying the rule under review is already in force – and since it has been in force for at least two (2) years – the issue here is not really whether the policy will be followed,[3] but whether it will be followed on a slow, case-by-case basis or through the more streamlined approach which results from the implementation of the new rule. Certainly, that issue does not require the attention of this Court.

1. Petitioner seeks to draw a distinction between the instant case and *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F. Supp. 925 (D. Del. 1973). The D.C. Circuit attached significance to the *Chemical Leaman* decision and, in particular, to the court's conclusion allowing the Commission to act through rulemaking in lieu of adjudication. While petitioner attempts to distinguish *Chemical Leaman* factually, it must be noted that the importance of that case derives from its legal underpinnings, rather than from its factual similarity.

[3] It is noteworthy that petitioner, while seemingly attacking the substance of the involved rule, fails to disclose any appeals of case-by-case analyses predicated on the very policy reflected in the involved rule. Presumably, if petitioner was concerned with the substance of the Commission's decision, it would have manifested that concern in one of the adjudicatory proceedings dealing therewith.

This Court has viewed rulemaking as a valid and indeed desirable way for agencies to resolve issues where the agency's expertise leads it to general findings with regard to the issues. In *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), this Court approved the F.C.C.'s application of a general rule to specific cases without the necessity of an adjudicatory hearing. The holding in *Storer* was premised on the fact that, in the Commission's judgment, there was no valid basis for such a hearing. The Court said that Congress did not intend for the agency to "waste time" on such applications. 351 U.S. at 205.

Similarly, in *FPC v. Texaco, Inc.*, 377 U.S. 33, this Court held that a rulemaking was appropriate and that statutory hearing requirements did not "preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who . . . [did not] show reasons why in the public interest the rule should be waived." 377 U.S. at 39. The intent of this Court's holdings in *Storer* and *Texaco* has been viewed as broad. Certainly there has been no limitation of the nature suggested by petitioner. *See, e.g., American Telephone & Telegraph Co. v. FCC*, 572 F.2d 17 (2nd Cir.), *cert. denied* 439 U.S. 875 (1978); *Thompson Van Lines, Inc. v. United States*, 399 F. Supp. 1131 (D.D.C. 1975), *aff'd* 423 U.S. 1041 (1976); *Upjohn Co. v. Finch*, 422 F.2d 944 (6th Cir. 1970). *See also Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

Here, moreover, the rule involved does not preclude any party from raising the issue of dual operations. Instead, it merely adopts a procedure which minimizes unnecessary litigation in a situation in which the Commission's policy generally does not justify a lengthy, formal proceeding. Nonetheless, when a formal proceeding on the dual operations issue is warranted, it is still available.

Petitioner suggests that rulemaking is only appropriate where "all the requirements of the section [of the statute] are met." (Petition, at 8). There is no such requirement. Rulemaking is intended to offer agencies an efficient means of satisfying their mandates. If the Commission finds dual operations to be in the public interest generally, a rule to that effect allows the agency to avoid unnecessary hearings on the question. At the same time, it still provides an opportunity for a hearing when an exception to the general rule is involved. This constitutes a means of handling Commission business in a fashion that is both orderly and efficient.[4] It is also an effective, indeed ideal, use of rulemaking for the reasons envisioned in *Storer* and *Texaco*.

2. Petitioner raises the question of the Commission's statutory authority for the involved rule, but never addresses itself to the issue in its petition. Notably, petitioner has discarded its interpretation of the legislative history of the dual operations provision of the statute, upon which it relied so heavily below. On page 10 of the petition, petitioner asserts that "Congress clearly intended the granting of such [dual operation] rights to be an *exception*. . . ." (emphasis in original). Nowhere does it provide support for such a notion, however, In fact, as the court found below, Congress certainly did not intend to shackle the Commission. Rather, it sought to invest it with "broad discretion in the discharge of its delegated responsibilities." (Appendix A to Petition, page 12a.) Consequently, the Commission's action here does not raise a substantial issue as to its statutory authority to act.

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[4] This Court's holding in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), affirms rulemakings intended to accomplish such results. 435 U.S. at 543-544.

3. On the issue of the rationality of the involved rule, petitioner once again raises a question and fails to address it in the body of its petition. It appears from pages 9 and 10 of the petition that petitioner's complaint derives from the source of the Commission's findings underlying the rule in question (the Commission's staff). It never articulates what nexus it feels is missing; it merely trifles with the weight attached to evidence considered by the Commission. Not only is such an issue unworthy of this Court's attention, but it is beyond the scope of judicial review in any event. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972).

4. Petitioner's final point misconstrues the nature and intent of the involved rule. What petitioner seeks is to have the Commission's pre-*Delaware Express* policy reinstated. Under the current policy, dual operations are generally in the public interest. Before, dual operators had to prove that dual operations were not contrary to the public interest. This case involves the question of whether a specific finding must be made in each case or whether such a finding can be made by rule. In either case, what an opposing party must show to ultimately prevail is identical. As such, no due process issue is realistically before the Court.

CONCLUSION AND PRAYER

WHEREFORE, respondents represented herein pray that the petition be denied and for such other and further relief as the Court deems proper in these premises.

Respectfully submitted,

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